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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1941.

No. **820** 8

IN THE MATTER OF  
**THE WESTERN PACIFIC RAILROAD COMPANY,**  
a corporation,

*Debtor.*

**CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO**  
and **SAMUEL ARMSTRONG**, as Trustees under The Western  
Pacific Railroad Company First Mortgage dated June 26, 1916,

*Petitioners,*

*v.*

**WESTERN PACIFIC RAILROAD CORPORATION**, a corpora-  
tion; **THE WESTERN PACIFIC RAILROAD COMPANY**,  
a corporation; **IRVING TRUST COMPANY**, a corporation, as  
substituted Trustee under the General and Refunding Mortgage of  
The Western Pacific Railroad Company; **A. C. JAMES CO.**, a  
corporation; **THE RAILROAD CREDIT CORPORATION**, a  
corporation; **FREDERICK H. ECKER**, **JOHN W. STEDMAN**  
and **REEVE SCHLEY**, constituting the Institutional First Mort-  
gage Bondholders Committee; and **RECONSTRUCTION**  
**FINANCE CORPORATION**,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED**  
**STATES CIRCUIT COURT OF APPEALS FOR THE NINTH**  
**CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

**ORVILLE W. WOOD,**

*Attorney for Petitioners, Crocker*  
*First National Bank of San Fran-*  
*cisco and Samuel Armstrong, as*  
*Trustees under The Western*  
*Pacific Railroad Company First*  
*Mortgage dated June 26, 1916.*

**ARTHUR A. GAMMELL,**

*Of Counsel.*

Dated, New York, N. Y., December 23, 1941.



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<sup>1</sup> Citations to Section 77 of the Bankruptcy Act are too frequent to enumerate. The pertinent portions of Section 77, i. e., Subsections (d) and (e), are printed in the Appendix at pages 21 and 22, respectively.

IN THE  
Supreme Court of the United States,

OCTOBER TERM, 1941.

No.

IN THE MATTER OF  
THE WESTERN PACIFIC RAILROAD COMPANY,  
a corporation,

*Debtor.*

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO  
and SAMUEL ARMSTRONG, as Trustees under The Western  
Pacific Railroad Company First Mortgage dated June 26, 1916,  
*Petitioners,*

v.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation;  
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation;  
IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the Institutional First Mortgage Bondholders Committee; and RECONSTRUCTION FINANCE CORPORATION,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.**

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petitioners, Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the First Mortgage of The Western Pacific Railroad Company, respectfully pray for a writ of certiorari to review a deci-



sion of the United States Circuit Court of Appeals for the Ninth Circuit rendered on November 28, 1941 (R. 2663, 2675), which reversed an order of the District Court of the United States for the Northern District of California, Southern Division, entered on August 15, 1940 (R. 1569). The order of the District Court approved a plan of reorganization (hereinafter called the "Commission Plan") for the Debtor, The Western Pacific Railroad Company, which had theretofore been approved and certified to the District Court by the Interstate Commerce Commission (R. 1600), in a proceeding for the reorganization of the Debtor under Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., § 205).

The Circuit Court of Appeals based its reversal of the order of the District Court upon the narrow ground that Section 77 imposed upon the Commission a duty to determine and certify to the District Court the values of sixteen separate items, that the Commission failed to perform that duty, and that the District Court therefore lacked the "requisite valuation data" to enable it to appraise the fairness of the Commission Plan. The Circuit Court of Appeals cited as authority the decision of this Court in *Consolidated Rock Products Co. v. Du Bois*, 312 U. S. 510 (1941). (R. 2670-2672.)

The Circuit Court of Appeals also criticized, as indicating "a possible misconception", a statement in the opinion of the District Court as to the relative functions of the Commission and of the District Court in approving a plan of reorganization (R. 2672-2674).

In discussing the basis upon which the secured creditors should participate in the reorganization, the Circuit Court of Appeals stated that "Fairness requires that their participation should be in proportion to the value of their respective claims" (R. 2669). Although the meaning is not clear, this statement apparently prescribes a rule of distribution at variance with the "full and absolute priority rule" enunciated by this Court in *Case v. Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939), and *Consolidated Rock Products Co. v. Du Bois*, *supra*.

The decision of the Circuit Court of Appeals omits to discuss the correctness of the District Court's determination of other issues which were before the Circuit Court of Appeals, thereby leaving unanswered important questions which, unless settled by this Court, may become the subject of further litigation having the effect of needlessly prolonging the reorganization proceedings.

The Institutional First Mortgage Bondholders Committee is filing a petition for a writ of certiorari to review the decision of the Circuit Court of Appeals on grounds similar to those urged in this petition and is filing with its petition a certified transcript and additional printed copies of the record in the case, including the proceedings in the Circuit Court of Appeals, in accordance with Rule 38 of this Court. The petitioners beg leave to refer to the certified transcript and additional printed copies of the record so filed by the Institutional First Mortgage Bondholders Committee for all purposes of this petition and respectfully pray that such certified transcript and additional printed copies of the record be deemed to accompany this petition, within the meaning of Rule 38 of this Court.

### **Summary Statement of Matter Involved.**

A statement of the relevant facts as to the nature and history of the proceedings, the findings of the Commission, and the action taken by the District Court and by the Circuit Court of Appeals appears at pages 4-23 of the above-mentioned petition of the Institutional First Mortgage Bondholders Committee. To avoid burdening this Court with what seems an unnecessary repetition, the petitioners beg leave to refer to that statement in the petition of the Institutional First Mortgage Bondholders Committee, which sets forth the factual data relevant to the consideration of this petition.\*

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\* The petition of the Committee states, in a footnote on page 20, that counsel for the Committee had received on December 20, 1941, a copy of a petition of the Refunding Mortgage Trustee for a rehearing in the Circuit Court of Appeals. Counsel for your petitioners also received on December 20, 1941, a copy of said petition of the Refunding Mortgage Trustee.



### Questions Presented.\*

1. Are the Commission's findings (a) that "the equity of the existing stock has no value" (R. 269) and (b) that "the claims of the unsecured creditors . . . have no value" (R. 269-270), if supported by the requisite valuation data, sufficient to sustain the Commission's conclusions that the stockholders and unsecured creditors should be excluded from participation in the reorganization?

2. As to the following findings of the Commission: (a) that the securities available for distribution to the secured creditors holding notes secured by the pledge of Refunding Bonds "are inadequate in value to satisfy the aggregate claims of these parties" (R. 271), (b) that the "allocation of reorganization securities to" Reconstruction Finance Corporation "exhausts the value of the collateral pledged by the debtor under the notes held by" Reconstruction Finance Corporation (R. 316); and (c) that "the equity of" The Railroad Credit Corporation "in such collateral has no value" (R. 316);—are these findings sufficient, if supported by the requisite valuation data, to sustain the Commission's conclusions that the "value of each of the claims is proportionate to the collateral securing it" (R. 271) and that the allocation of new securities issued in respect of the pledged Refunding Bonds "should be made on the basis of the collateral held rather than on the amount of the claims" (R. 271)?

3. Should the participation in the reorganization of the holders of First Mortgage Bonds and of the pledgee holders of Refunding Bonds, respectively, be "in proportion to the value of their respective claims", ascertained by determining the exact dollar values of (1) the Debtor's entire prop-

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\* The questions presented and the reasons relied on for the allowance of the writ as set forth in this petition are substantially identical with those set forth in the petition of the Committee. This method of presentation has been adopted because the petitioners and the Committee are similarly situated in respect of their applications for certiorari.

erty, (2) the property subject to the First Mortgage as a first lien and to the Refunding Mortgage as a second lien, (3) the property subject to the Refunding Mortgage as a first lien, and (4) the new securities distributable to each class? Or should their participation be based upon a determination by the Commission, in terms of the new securities, of the "equitable equivalent of the debtor's assets available for the satisfaction" of the respective claims of each class, giving due effect to the relative priorities of the respective mortgages upon system earnings at the different levels which such earnings must reach in order to service the various classes of new securities and all other factors which should be considered in order that the District Court may approve the result as being fair and equitable?

4. May not the two claims of Reconstruction Finance Corporation, the one represented by the outstanding Trustees' Certificates and the other represented by notes secured by the pledge of Refunding Bonds, be treated as an "entire bundle of rights" and dealt with on the basis of a practicable and fair compromise which will eliminate the necessity of obtaining elsewhere on less favorable terms the new money needed to refinance the outstanding Trustees' Certificates?

5. Does the present record contain sufficient valuation data to support the Commission's findings and conclusions as to what classes are entitled to participate in the reorganization and as to what new securities should be allocated to each of such classes?

6. Does not Section 77 vest exclusively in the Commission jurisdiction to determine whether a plan of reorganization "will be compatible with the public interest", including jurisdiction to determine the amount, character and financial details of capitalization, and is not the scope of the judicial review of the Commission's determination of such matters limited to an inquiry as to whether the Commission's action was arbitrary or in excess of its constitutional or statutory powers?

7. Should not this Court, upon the entire record, reverse the judgment or decree of the Circuit Court of Appeals and affirm the order of the District Court approving the Commission Plan, in view of the public interest in bringing about a speedy termination of the reorganization proceedings, and in order to prevent further and unnecessary litigation of questions which were before the Circuit Court of Appeals but as to which the Circuit Court of Appeals made no specific determination?

8. Should the costs of a successful appeal be assessed against mortgage trustees whose appearance as appellees before a circuit court of appeals is occasioned solely by reason of the circumstance that the appellants challenge the fairness of the treatment accorded their *cestuis que trustent* under a plan of reorganization approved by the Commission and by a district court, or should such costs be assessed directly against the debtor's estate?

### **Reasons Relied on for the Allowance of the Writ.**

1. The Commission, in finding that "the equity of the existing stock has no value" (R. 269) and that "the claims of the unsecured creditors . . . have no value" (R. 269-270), in effect determined that the value of the Debtor's property did not exceed the value of the claims of the secured creditors. The decision of the Circuit Court of Appeals apparently requires a determination of the exact dollar value of the Debtor's property in order to sustain the exclusion of stockholders and unsecured creditors from participation in the reorganization.

In this respect, the decision of the Circuit Court of Appeals is believed to be in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *In the Matter of Chicago, Milwaukee, St. Paul & Pacific R. R. Co., Debtor*, (C. C. A., 7th Circ., December 4, 1941, not yet reported), and with the decisions of this Court in *Consolidated Rock Products Co. v. Du Bois*, *supra*, p. 2,

and *Case v. Los Angeles Lumber Products Co., Ltd., supra*, p. 2.

If the decision of the Circuit Court of Appeals is not in conflict with the decisions of this Court above cited, then the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The question here presented is not peculiar to this case. The method of determining and stating values employed by the Commission in this case has been employed by it in formulating other railroad reorganization plans, some of which have been consummated, after receiving final approval by the courts, and some of which are now pending before various district courts and circuit courts of appeals. The question is therefore one of widespread public interest which can be authoritatively settled only by this Court.

2. The Circuit Court of Appeals held that the participation in the reorganization of the holders of First Mortgage Bonds and of the pledgee holders of Refunding Bonds, respectively, "should be in proportion to the value of their respective claims" and, to that end, required a determination of the respective values of (1) the Debtor's entire property, (2) the property subject to the First Mortgage as a first lien and to the Refunding Mortgage as a second lien, (3) the property subject to the Refunding Mortgage as a first lien, and (4) the new securities distributable to each class (R. 2669-2670). This apparently requires that the allocation of new securities to these secured creditors be made in accordance with a precise mathematical formula based upon exact dollar values.

In this respect, the decision of the Circuit Court of Appeals is believed to be in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Jameson v. Guaranty Trust Co. of New York*, 20 F. (2d) 808 (C. C. A., 7th Circ., 1927), cert. denied, 275 U. S. 569 (1927), and the decision of the Circuit Court of Appeals for the Second Circuit in *In re Radio-Keith-Orpheum Corporation*, 106 F. (2d) 22 (C. C. A., 2nd Circ., 1939), cert.



denied, 308 U. S. 622 (1940). It is also believed to be in conflict with the decisions of this Court in *Consolidated Rock Products Co. v. Du Bois*, *supra*, p. 2, and *Case v. Los Angeles Lumber Products Co., Ltd.*, *supra*, p. 2.

If the decision of the Circuit Court of Appeals is not in conflict with the decisions of this Court above cited, then the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

If the decision of the Circuit Court of Appeals be interpreted as requiring that new securities of each available class be allocated to each class of these secured creditors in amounts proportionate to the respective dollar values of their claims, without regard to the relative priorities of the mortgage liens securing their claims, then the decision of the Circuit Court of Appeals prescribes a rule of distribution which violates the "full and absolute priority rule" enunciated by this Court in *Case v. Los Angeles Lumber Products Co., Ltd.*, *supra*, p. 2, and *Consolidated Rock Products Co. v. Du Bois*, *supra*, p. 2.

3. If the decision of the Circuit Court of Appeals be interpreted as holding that the two claims of Reconstruction Finance Corporation may not be treated as an "entire bundle of rights" and dealt with on the basis of a practicable and fair compromise which will eliminate the necessity of obtaining elsewhere on less favorable terms the new money needed to refinance the outstanding Trustees' Certificates, the decision of the Circuit Court of Appeals is in this respect believed to be in conflict with the decision of this Court in *Case v. Los Angeles Lumber Products Co., Ltd.*, *supra*, p. 2.

4. The Circuit Court of Appeals held that the District Court lacked "the requisite valuation data" to enable it "to exercise the 'informed, independent judgment' which appraisal of the fairness of a plan of reorganization entails" (R. 2671).

In this respect, the decision of the Circuit Court of Appeals is believed to be in conflict with the decisions of

this Court in *Case v. Los Angeles Lumber Products Co., Ltd.*, *supra*, p. 2, and *Consolidated Rock Products Co. v. Du Bois*, *supra*, p. 2.

If the decision of the Circuit Court of Appeals is not in conflict with the decisions of this Court above cited, then the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

5. The Circuit Court of Appeals criticized, as indicating "a possible misconception" (R. 2672), a statement in the opinion of the District Court as to the relative functions of the Commission and of the District Court in approving a plan of reorganization and held that:

"In determining whether a plan of reorganization satisfies the requirements of subsection (e), the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject" (R. 2674).

In this respect, the decision of the Circuit Court of Appeals is believed to be in conflict with the decision of this Court in *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541, 547-548 (1912), and other decisions of this Court enunciating the familiar doctrine of the finality of administrative determinations, and with the decisions of this Court in *Palmer v. Massachusetts*, 308 U. S. 79 (1939), and *Warren v. Palmer*, 310 U. S. 132 (1940).

If the decision of the Circuit Court of Appeals is not in conflict with the decisions of this Court referred to above, then the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

6. In omitting to discuss all of the issues which were before the Circuit Court of Appeals, the decision of the



Circuit Court of Appeals has left unanswered many important questions, affecting virtually every feature of the Commission Plan. An authoritative determination of all of these questions is essential to the final approval of a plan of reorganization. Unless these questions are settled by this Court, they are likely to become the subject of further litigation, which will result in further and unnecessary delay and expense to the parties concerned.

The petitioners believe that the public interest will be promoted by prompt settlement in this Court of these questions.

In *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935), this Court said (p. 685):

"The delay and expense incident to railroad receiverships and foreclosure sales constituted, probably, the chief reasons which induced the passage of § 77; and to permit the perpetuation of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted. Not only are those who institute the proceeding and those who carry it forward bound to exercise the highest degree of diligence, but it is the duty of the court and of the Interstate Commerce Commission to see that they do."

To the end that these reorganization proceedings, which have been pending since 1935, may be speedily determined, the petitioners respectfully pray that this Court review the entire case upon the entire record and determine all of the questions involved.

7. The Circuit Court of Appeals, in assessing the costs of the appeal against the petitioners and the other appellees, the Institutional First Mortgage Bondholders Committee and Reconstruction Finance Corporation<sup>b</sup> (R. 2676), has decided an important question of federal law which has not been, but should be, settled by this Court.

WHEREFORE, the petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court, on a day to be determined, a full and complete transcript of the record of all of the proceedings had in this cause, to the end that this cause may be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals be reversed; that the order of the District Court be affirmed; and that the petitioners be granted such other and further relief as may be proper.

Dated, New York, N. Y., December 23, 1941.

ORVILLE W. WOOD,  
*Attorney for Petitioners, Crocker First  
National Bank of San Francisco and  
Samuel Armstrong, as Trustees un-  
der The Western Pacific Railroad  
Company First Mortgage dated June  
26, 1916.*

ARTHUR A. GAMMELL,  
*Of Counsel.*



## **BRIEF IN SUPPORT OF PETITION.**

### **Opinions Below.**

The Commission's report and order (R. 284) dated October 10, 1938, approving a plan of reorganization for the Debtor, is reported at 230 I. C. C. 61. The Commission's report and order on further consideration (R. 300, 362) dated June 21, 1939, modifying the plan of reorganization approved in the Commission's report and order dated October 10, 1938, is reported at 233 I. C. C. 409. The Commission's order (R. 884) dated September 19, 1939, denying the Debtor's petition for modification of the Commission Plan, is reported at 236 I. C. C. 1.

The opinion of the District Court (R. 1569) dated August 15, 1940, approving the Commission Plan, is reported at 34 F. Supp. 493.

The opinion of the Circuit Court of Appeals dated November 28, 1941, reversing the order of the District Court, has not yet been officially reported but appears at R. 2663.

### **Jurisdiction.**

The decree of the Circuit Court of Appeals now sought to be reviewed was entered on November 28, 1941. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., § 347(a)) and Section 24(c) of the Bankruptcy Act (11 U. S. C. A., § 47(c)).

### **Statement of the Case.**

A summary statement of the relevant facts is incorporated by reference in the petition, *supra*, p. 3.

### **Statutes Involved.**

The statutes involved are set forth in the Appendix, *infra*, pp. 21-26.

## A R G U M E N T .

### P O I N T I .

#### **The Decision of the Circuit Court of Appeals Raises Questions of Far-reaching Importance in Railroad Reorganizations under Section 77.**

Since the enactment of Section 77, the Commission has formulated and certified to various district courts numerous plans of reorganization. In formulating these plans of reorganization, the Commission has uniformly, so far as we are aware, employed methods of determining and stating values similar to those which it employed in formulating the Commission Plan. Many of these plans of reorganization have received the final approval of the courts having jurisdiction and have already been consummated. Others are still pending before various district courts and circuit courts of appeals.

Prior to the decision of the Circuit Court of Appeals in this case, no court, so far as we are aware, had questioned the correctness or sufficiency of the Commission's methods of determining and stating values. Consequently, the decision of the Circuit Court of Appeals in this case fell like a bombshell. Its unsettling effect upon other pending plans of reorganization is apparent.

Less than a week after the Circuit Court of Appeals rendered its decision in this case, the Circuit Court of Appeals for the Seventh Circuit rendered its decision in the *Milwaukee* case (*supra*, p. 6), which added to the confusion, because it agreed in some respects and disagreed in other respects with the conclusions reached in this case with respect to the Commission's methods of determining and stating values.

Under these circumstances, we submit, the public interest urgently requires that the questions involved be authoritatively settled by this Court.

The valuation questions raised by the decision of the Circuit Court of Appeals in this case go to the heart of the entire reorganization process under Section 77. The



other questions raised by the decision—such as the question as to the relative functions of the Commission and of the district courts in approving plans of reorganization—are likewise of far-reaching importance in railroad reorganizations under Section 77. This case is therefore a particularly appropriate one for the granting of a writ of certiorari.

## **POINT II.**

**The Decision of the Circuit Court of Appeals on the Valuation Questions is in Conflict with the Applicable Decisions of this Court and with the Decisions of Other Circuit Courts of Appeals.**

The valuation questions raised by the decision of the Circuit Court of Appeals have a twofold aspect: (1) in relation to the exclusion of particular classes of stockholders or creditors from participation in the reorganization, and (2) in relation to the allocation of new securities among those entitled to participate.

A. In the first aspect, the question is simply this: May a particular class be excluded from participation in the reorganization upon the basis of a finding that the value of the property does not exceed the amount of all prior claims, provided that the evidence in the record supports that finding? Or must the finding state the exact dollar value of the property?

A finding that the equity of the stock has no value is a finding that the value of the Debtor's property does not exceed the Debtor's liabilities. It is in substance and effect a finding of insolvency in the bankruptcy sense. A finding that the claims of a particular class of creditors have no value is a finding that the value of the property available for the satisfaction of those claims does not exceed the amount of the prior claims against that property.



In the *Los Angeles Lumber Products* case (*supra*, p. 2), this Court said (p. 126):

"Furthermore, stockholders and other junior interests may be excluded from any plan of reorganization if the court finds that the debtor is insolvent. *In re 620 Church Street Building Corp.*, 299 U. S. 24."

In the *Consolidated Rock Products* case (*supra*, p. 2), this Court, in emphasizing the "criterion of earning capacity" as the essential one in determining values, said (p. 526):

"Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made."

In the *Milwaukee* case (*supra*, p. 6), the Circuit Court of Appeals for the Seventh Circuit, in the light of the evidence in the record before it, regarded as sufficient to sustain the exclusion of stockholders from participation in the reorganization a finding by the Commission that the equity of the stock had no value, substantially identical with the finding made by the Commission in this case.

In finding that the equity of the stock and the claims of the unsecured creditors have no value, the Commission in this case has made a finding of the ultimate fact upon which the exclusion of the stockholders and unsecured creditors from participation in the reorganization depends. An examination of the record will show that it contains abundant valuation data to support those findings. We submit that no useful purpose would be served by requiring a finding of the exact dollar value of the Debtor's property.

B. In the second aspect, the question broadly stated is this: Must the allocation of new securities among those entitled to participate in the reorganization be based upon a precise mathematical formula, expressed in terms of equivalents of exact dollar values of claims to exact dollar

values of new securities, such dollar values to be ascertained by determining the exact dollar values of the properties securing the respective claims and the respective new securities? Or may the allocation be based upon a determination of the "equitable equivalent of the assets available for the satisfaction" of the respective claims of each class, expressed in terms of new securities?

This question strikes at the very vitals of the reorganization process under Section 77. A requirement that the allocation of new securities be fitted into a precise mathematical formula such as that prescribed by the Circuit Court of Appeals is, we submit, violative of reorganization principles which have received the sanction of this Court in the *Los Angeles Lumber Products* case (*supra*, p. 2) and in the *Consolidated Rock Products* case (*supra*, p. 2), and which have received the sanction of the Circuit Court of Appeals for the Seventh Circuit in the *Jameson* case (*supra*, p. 7) and of the Circuit Court of Appeals for the Second Circuit in the *Radio-Keith-Orpheum* case (*supra*, p. 7).

In the *Consolidated Rock Products* case, this Court held that the "criterion of earning capacity is the essential one" (p. 526). Subsection (e) of Section 77 (11 U. S. C. A., § 205(e)) likewise makes earning capacity the essential criterion of value.

As stated in the *Consolidated Rock Products* case, since the application of the criterion of earning capacity "requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made" (p. 526). To apply this test in the strait-jacket formula required by the decision of the Circuit Court of Appeals is a practical impossibility.

A finding of the exact dollar values of railroad properties in terms of earning capacity requires the assumption of a precise level of earnings. The relative priorities of claims of different classes may depend upon the varying

levels of prospective earnings at which the various properties begin to shown earning power.

To adopt the principle enunciated by the Circuit Court of Appeals would be to substitute a rigid scholastic formula for a flexible realistic approach to the complex problems of railroad reorganization.

### POINT III.

**The Decision of the Circuit Court of Appeals as to the Relative Functions of the Commission and of the District Court in Approving a Plan of Reorganization is in Conflict with the Applicable Decisions of this Court.**

Subsection (d) of Section 77 (11 U. S. C. A., § 205(d) ), which defines the functions of the Commission in approving a plan of reorganization, confers upon the Commission jurisdiction to determine whether the plan "will be compatible with the public interest". Subsection (e), which defines the functions of the District Court, confers no such jurisdiction upon the District Court. Thus, by the express terms of the statute, jurisdiction to determine whether a plan of reorganization "will be compatible with the public interest" is vested exclusively in the Commission.

This exclusive jurisdiction, we submit, includes jurisdiction to determine the amount, character and financial details of capitalization.

In *Interstate Commerce Commission v. Union Pacific Railroad Company*, *supra*, p. 9, and in other decisions enunciating the well-established doctrine of the finality of administrative determinations, this Court has held that the scope of the judicial review of the Commission's determinations upon matters committed to its administrative juris-

diction is limited to an inquiry as to whether the Commission's action was arbitrary or in excess of its constitutional or statutory powers.

The applicability of this doctrine to the Commission's determinations of the "public interest" questions under Section 77 is indicated by the expressions of this Court in *Palmer v. Massachusetts*, *supra*, p. 9, and *Warren v. Palmer*, *supra*, p. 9.

In *Palmer v. Massachusetts*, this Court said (p. 87):

"The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the court to the Commission's approval of the court's plan of reorganization the authority of the court is intertwined with that of the Commission."

And in *Warren v. Palmer*, this Court said (p. 138):

"The judicial functions of the bankruptcy court and the administrative functions of the Commission work cooperatively in reorganizations."

The decision of the Circuit Court of Appeals in this case that,

"In determining whether a plan of reorganization satisfies the requirements of subsection (e), the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject" (R. 2674),

is, we submit, not only contrary to the express provisions of Section 77; it runs counter to a principle of administrative law which has long been established by this Court.

**Conclusion.**

This case involves questions of widespread public interest and far reaching importance in the field of railroad reorganizations which should be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed for in the foregoing petition.

Dated, New York, N. Y., December 23, 1941.

Respectfully submitted,

OSVILLE W. WOOD,  
*Attorney for Petitioners, Crocker  
First National Bank of San Fran-  
cisco and Samuel Armstrong, as  
Trustees under The Western Pacific  
Railroad Company First Mortgage  
dated June 26, 1916.*

ARTHUR A. GAMMELL,  
*Of Counsel.*



## **Appendix.**

### **The Statutes Involved.**

Subsection (d) of Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., § 205(d) ) provides as follows:

“(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

“The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of



its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court."

Subsection (e) of Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., § 205(e) ) provides as follows:

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such

hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity

of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission

is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided, That*; if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further, That* if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further, That* if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the

proposal of new plans, In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."



